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ATTORNEY DOCKET NO. CONFIRMATION NO. FIRST NAMED INVENTOR FILING DATE APPLICATION NO. 3198 2380.007 Bret O. Baynham 02/10/2004 10/776,369 **EXAMINER** 07/18/2006 21917 7590 CUMBERLEDGE, JERRY L MCHALE & SLAVIN, P.A. 2855 PGA BLVD PAPER NUMBER ART UNIT PALM BEACH GARDENS, FL 33410 3733

DATE MAILED: 07/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

	Application No.	Applicant(s)
	10/776,369	BAYNHAM ET AL.
Office Action Summary	Examiner	Art Unit
•	Jerry Cumberledge	3733
The MAILING DATE of this communication a	ppears on the cover sheet w	ith the correspondence address
Period for Reply		ACNITU(C) OR THIRTY (20) DAYS
A SHORTENED STATUTORY PERIOD FOR REF WHICHEVER IS LONGER, FROM THE MAILING - Extensions of time may be available under the provisions of 37 CFR after SIX (6) MONTHS from the mailing date of this communication If NO period for reply is specified above, the maximum statutory peri - Failure to reply within the set or extended period for reply will, by sta Any reply received by the Office later than three months after the may earned patent term adjustment. See 37 CFR 1.704(b).	DATE OF THIS COMMON 1.136(a). In no event, however, may a od will apply and will expire SIX (6) MO type, cause the application to become A	reply be timely filed NTHS from the mailing date of this communication. BANDONED (35 U.S.C. § 133).
Status		
1) Responsive to communication(s) filed on 2a) This action is FINAL . 2b) ▼ T 3) Since this application is in condition for allow closed in accordance with the practice under	his action is non-final. wance except for formal ma	tters, prosecution as to the merits is D. 11, 453 O.G. 213.
Disposition of Claims		
4) ⊠ Claim(s) <u>1-20</u> is/are pending in the applicating 4a) Of the above claim(s) is/are without 5) ☐ Claim(s) is/are allowed. 6) ⊠ Claim(s) <u>1-20</u> is/are rejected. 7) ☐ Claim(s) is/are objected to. 8) ☐ Claim(s) are subject to restriction and	drawn from consideration.	
Application Papers	•	
9) The specification is objected to by the Exam 10) The drawing(s) filed on 10 February 2004 is Applicant may not request that any objection to Replacement drawing sheet(s) including the cor 11) The oath or declaration is objected to by the	/are: a)⊠ accepted or b)☐ the drawing(s) be held in abey rection is required if the drawir	ance. See 37 CFR 1.85(a). g(s) is objected to. See 37 CFR 1.121(d).
Priority under 35 U.S.C. § 119		
12) Acknowledgment is made of a claim for force a) All b) Some * c) None of: 1. Certified copies of the priority docum 2. Certified copies of the priority docum 3. Copies of the certified copies of the application from the International Bu * See the attached detailed Office action for a	nents have been received. nents have been received in priority documents have been reau (PCT Rule 17.2(a)).	Application No en received in this National Stage
Attachment(s) 1) Notice of References Cited (PTO-892)		w Summary (PTO-413)
 1) Notice of References Cited (P10-092) 2) Notice of Draftsperson's Patent Drawing Review (PTO-948) 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SI Paper No(s)/Mail Date 11/08/04. 	Paper N	lo(s)/Mail Date of Informal Patent Application (PTO-152)

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DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 states "...said first and second bars each having a screw hole..." and claim 2 states "...screw holes in said first bar on each side of said elongated shaft..." It is ambiguous as to whether applicant is claiming precisely one hole in the bar, or whether the bar has multiple holes. Examiner suggests the use of the phrase --at least one screw hole-- in claim 1.

Claims 2, 3, 7, 15 and 16 state "...a [or said] clip having a retainer spanning each of said screw holes..." It is unclear whether applicant is referring to only the screw holes on each respective bar, or generally to all of the screw holes in the entire plate. It appears from the applicant's disclosure that the applicant intends for the retainer to span across the holes on each specific bar and not the entire plate, and the examiner will use that interpretation throughout this office action.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 as best understood, are rejected under 35 U.S.C. 102(b) as being anticipated by Michelson (US Pub. 2002/0188296 A1).

Michelson discloses a dynamic spinal plate comprising: an elongated shaft 852 (Fig. 40 below) with a proximal surface and a distal surface (Fig. 40 below), the elongated shaft having a first bar 804 (Fig. 40 below) near one end, the shaft having an opposite end (Fig. 40 below), at least a second bar 866 (Fig. 40 below), said first and said second bars each having a screw hole 826 (Fig. 40 below), a clip (Fig. 41 below) attached to the second bar, the clip having a retainer 902 (Fig. 41 below) spanning the screw hole. Michelson further discloses the first bar being fixed to the shaft (Fig. 40 below), screw holes 826 (Fig. 40 below) in the first bar on each side of the elongated shaft, a clip (Fig. 41 below) attached to the first bar, the clip having a retainer 902 (Fig. 41 below) spanning each of the screw holes. Michelson further discloses the second bar extending transverse to the elongated shaft (Fig. 40 below), screw holes 826 (Fig. 40 below) in the second bar, one on each side of the elongated shaft, the clip (Fig. 41 below) attached to the second bar having a retainer 902 (Fig. 41 below) spanning each of the screw holes. The elongated shaft has a longitudinal groove (Fig. 40 below) (paragraph 0110, lines 3-8) along each side; the second bar includes a central depression (Fig. 40 below) with shoulders on each side (Fig. 40 below). A third bar 802 (Fig. 40 below) is slidably attached near the opposite end of the elongated shaft (Fig. 40). The third bar extends transverse to the elongated shaft (Fig. 40); there are screw

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holes 826 (Fig. 40) in the third bar on each side of the elongated shaft, a clip (Fig. 41 below) fixed to the third bar having a retainer 902 (Fig. 41 below) spanning each of the screw holes. The third bar includes a central depression (Fig. 40 below) with shoulders (Fig. 40 below) on each side. The plate has teeth formed in the distal surface along its length (Fig. 40 below). The teeth are angled (Figs. 11 and 12 below).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 9-20, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Michelson (US Pub. 2002/0188296 A1) in view of Keller (US Pat. 5,234,431).

Michelson discloses the claimed invention except for the clip having a pawl portion seated between adjacent teeth on the distal side of the plate.

Keller discloses the clip having a pawl portion 14 (Fig. 6 below) seated between adjacent teeth on the distal side of the plate. The pawls are used to engage the teeth along the shaft to prevent displacement of the clip (column 4, lines 9-15).

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to have constructed the clip of Michelson with the pawls of

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Keller, in order to allow the pawls to grip the teeth and to prevent displacement of the

clip (column 4, lines 9-15).

With regard to statements of intended use and other functional statements, they do not impose any structural limitations on the claims distinguishable over the dynamic spinal plate of Michelson as modified by Keller, which is capable of being used as claimed if one so desires to do so. In re Casey, 152 USPQ 235 (CCPA 1967) and In re Otto, 136 USPQ 458, 459 (CCPA 1963). Furthermore, the law of anticipation does not require that the reference "teach" what the subject patent teaches, but rather it is only necessary that the claims under attack "read on" something in the reference. Kalman v. Kimberly Clark Corp., 218 USPQ 781 (CCPA 1983). Furthermore, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ2d 1647 (1987).

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See attached PTO-892.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jerry Cumberledge whose telephone number is (571) 272-2289. The examiner can normally be reached on Monday - Friday, 8:30 AM -5:00 PM.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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